IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-1355

RUSSELL McNIFF,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI

Russell NcNiff, petitioner, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on January 18, 1978 affirming the judgment of conviction of the United States District Court for the Central District of California. Petitioner filed a timely petition for rehearing on January 30, 1978 which was denied on February 24, 1978. However, in

denying the rehearing petition the Court of Appeal modified its January 18th Memorandum Order. The Court of Appeal also denied petitioner's motion for an order staying the issuance of the mandate.

OPINIONS BELOW

The United States District Court rendered no decision when it pronounced judgment on March 4, 1977. The Memorandum decision of January 18, 1978 of the United States Court of Appeal for the Ninth Circuit is unreported and is reprinted in Appendix No. 1 to this Petition.* The Order of February 24, 1978, also unreported, which modified the January 18th Memorandum, which denied the Petition for Rehearing, and which denied the motion for an order staying the issuance of the mandate, is reprinted in Appendix No. 2.

JURISDICTION

The judgment of the Court of Appeal was entered January 18, 1978. The order denying a timely petition for rehearing was entered February 24, 1978. This Court has jurisdiction to review the judgment by writ of certiorari under 28 U.S.C. §1254(1).

*It is reprinted as modified by the Ninth Circuit's order of February 24, 1978.

QUESTIONS PRESENTED

1. In determining whether a prosecutor's closing argument violates Griffin v. California, 380 U.S. 609 (1965) (comment on a defendant's failure to testify), does the appellate court first have to decide whether the argument was, in fact, a comment on the defendant's silence and, if so, whether such comment was harmless beyond a reasonable doubt?

2. Did the Court of Appeal err in not deciding whether the prosecutor's argument constituted a comment on petitioner's failure to testify?

3. Did the Court of Appeal err in failing to distinguish between:

   a) argument which does not constitute a comment on a defendant's refusal to testify; and

   b) argument which does constitute such comment, but the comment is harmless,

by merely stating ambiguously,

"The prosecutor's statement to the jury . . . was not so clear a comment on McNiff's failure to testify that it requires reversal."

4. Did the prosecutor violate petitioner's Fifth Amendment privilege against self-incrimination by telling the jury that certain government witnesses were "crooks" but that petitioner was not willing to admit he was a crook?

5. Did the District Court violate petitioner's right to a fair trial under the Fifth Amendment and his rights to a jury trial and effective assistance of counsel under the Sixth Amendment by cutting petitioner's counsel's closing argument by 33-1/3% (from 60 minutes to 40 minutes), in view of the complexity of the trial and the court's admonition to the jury that it is not its custom to permit the jurors to have testimony read to them?

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment:

"No person shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . ."

The Sixth Amendment:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to have the assistance of counsel for his defense."

STATEMENT OF THE CASE

On October 20, 1976 petitioner and five other persons were indicted for conspiracy (18 U.S.C. §371), mail fraud (18 U.S.C. §1341), and fraudulent use of ficticious business names (18 U.S.C. §1342). The defendants were generally alleged to have been involved in a scheme wherein companies were billed for office supplies neither ordered nor delivered. Three of the six defendants (Larry Field, Leonard Berk and Paul Sulak) pleaded guilty prior to trial and testified for the Government. One defendant was never apprehended. Petitioner and co-defendant Harvey Weisenthal went on trial on January 18, 1977 after certain counts were dismissed. 1/

During the trial the Government called twenty-one witnesses, including the three

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1/ The indictment originally contained thirty counts.

co-conspirators who pleaded guilty and one other participant, Douglas Giddings,[2] and introduced over thirty-eight exhibits. Two witnesses testified on behalf of petitioner. None testified on behalf of co-defendant Weisenthal. Neither petitioner nor co-defendant Weisenthal testified.

At the conclusion of the evidentiary phase of the trial, petitioner's counsel requested one hour for his closing argument to the jury, but the court alloted him only forty minutes (Tr. 746-747), giving no reason for its time limitation. The court also limited what counsel could argue:

> "THE COURT: Well, you won't be given an hour. You will be given 40 minutes. If you do more than talk about the instructions of law in the way that touches upon the jury's obligation not to return a verdict unless they are satisfied beyond a reasonable doubt, then I will have to interrupt you."
> (Tr. 747, lines 15-20.)

The time limit significantly restricted the scope of counsel's argument. It took him thirty minutes to discuss general matters. He was left with ten minutes to cover the testimony of the witnesses and conclude (Tr. 811, lines 11-14). Therefore, he could touch only briefly on their testimony, and found it necessary to tell the jury

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[2] Giddings admitted commiting a burglary to obtain business records for the conspirators.

that it could have the court reporter read testimony it could not recall. However, the court interrupted to tell the jury it could not have such testimony read. The court's message was clear although phrased ambiguously:

> "Just a minute, counsel. It is not the custom in this courthouse, ladies and gentlemen of the jury, to have the court reporter read testimony. Very exceptionally. Proceed."
> (Tr. 811-812.)

Counsel responded with less than ten minutes left for his argument:

> "Well, then, you are going to have to recall or use your memory here on the testimony or your notes."
> (Tr. 812.)

Counsel was not able, in the short time allotted, to discuss to any significant extent, the testimony of the major witnesses for the prosecution.

The prosecutor, during his rebuttal closing argument, told the jury,

> "No question Mr. Giddings is a crook. Mr. Berk, Mr. Field, Mr. Sulak, they are all crooks. They told you that. I am telling you that. The only difference between those people and these two gentlemen [petitioner McNiff and co-defendant Weisenthal]

is that they [Government witnesses Giddings, Berk, Field and Sulak] are willing to admit they are crooks." (Tr. 822, lines 17-21; language in brackets added for clarification.)

This comment of the prosecutor during his rebuttal closing argument prompted petitioner to move for a mistrial[3/] on the basis of Griffin v. California, 380 U.S. 609 (1965). The court responded,

> "I will have to adjourn at this time and consider it. It may be that I will have to grant the motion." (Tr. 832-833.)

The trial court ultimately denied the motion, noting that the prosecutor did not specifically state, "The defendants are not willing to admit their guilt." (Tr. 837-838). The court instructed the jury that a defendant in a criminal case does not have to testify and that "no presumption of guilt may be raised and no inference of any kind may be drawn from the failure of a defendant to testify." (Tr. 844-845.)

On May 26, 1977 at 3:30 P.M. the jury retired to deliberate (Tr. 894). At 5:00 P.M. the jury concluded its deliberations for the day; it returned the following morning to resume deliberating. At 3:00 P.M. the jury rendered its verdicts:

> Petitioner was found guilty on Counts 1, 2, 3 and 30. Co-defendant Weisenthal was found guilty on Counts 1, 2, 3, 12,

3/ Co-defendant Weisenthal also moved for a mistrial.

> 14, 17, 18, 19, 24, 27, 29 and 30 (Tr. 907-908), all other counts having been dismissed prior to trial.

On March 4, 1977 petitioner was sentenced to fifteen months imprisonment as to Counts 1 and 30, to run concurrently with each other, and five years probation as to Counts 2 and 3, to run concurrently with each other and consecutively to the fifteen months imprisonment. Petitioner immediately filed his notice of appeal and was permitted to remain free on bond. Co-defendant Weisenthal failed to appear for sentencing and is a fugitive. Accordingly, he filed no notice of appeal.

The United States Court of Appeal for the Ninth Circuit devoted one paragraph to petitioner's contention that the court's denial of his request for one hour for closing argument violated his Fifth and Sixth Amendment rights and one sentence to petitioner's contention that the prosecutor's comment regarding petitioner's unwillingness to admit guilt violated his Fifth Amendment privilege against self incrimination. The appellate court affirmed the conviction in an unpublished Memorandum filed January 18, 1978. On February 24, 1978 the court, in response to a timely petition for rehearing, modified slightly the language of its earlier Memorandum, and denied the petition. It also denied a timely motion for an order staying the issuance of the mandate pending the filing of this petition for writ of certiorari.

REASONS FOR GRANTING THE WRIT

A. THIS CASE PRESENTS AN IMPORTANT QUESTION OF CONSTITUTIONAL LAW INVOLVING THE METHOD BY WHICH A COURT DETERMINES THE EXISTENCE OF "GRIFFIN" ERROR, A QUESTION NOT YET DECIDED BUT WHICH SHOULD BE SETTLED BY THIS COURT.

Petitioner contended in the trial court and in the Court of Appeal that the prosecutor's statement in his rebuttal closing argument constituted a comment on petitioner's failure to testify. The trial court apparently concluded that the statement was not a comment on petitioner's failure to testify; therefore, it had no reason to determine whether the "error" was harmless beyond a reasonable doubt under Chapman v. California, 386 U.S. 18 (1967). Obviously, if no error was committed there was no need to go further. The Court of Appeal conceded that the comment was "of questionable propriety" but was vague as to whether it constituted a comment on petitioner's failure to testify. Specifically, the Court of Appeal's entire response to petitioner's contention was,

> "The prosecutor's statement to the the jury, that the only difference between the defendants and the witnesses who testified for the government was that the government's witnesses were willing to admit that they were crooks, while of questionable propriety, was not so clear a comment on McNiff's failure to testify, that it requires reversal. [Citations omitted.]"

The Court of Appeal's ambiguous characterization of the prosecutor's statement apparently fell short of constituting a comment within the holding of Griffin v. California; had the Court of Appeal felt the statement was a comment on petitioner's failure to testify, it would have had to have gone further to determine its impact upon the trial. In its refusal to construe the statement as a comment on petitioner's silence, the Court of Appeal has differed from other circuits which have found indirect comments to constitute Griffin error. See Carlin v. United States, 351 F.2d 618 (5th Cir. 1965) (conviction reversed because of prosecutor's indirect comment) and Desmond v. United States, 345 F.2d 225, 14 A.L.R. 3d 718 (1st Cir. 1965).

The Tenth Circuit's test, relied on frequently by other circuits, is whether

> ". . . the language used was manifestly intended or was of such a character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify."

Knowles v. United States, 224 F.2d 168, 170 (10th Cir. 1955).[4/]

The language of the prosecutor in the instant case, which contrasted the willingness of four criminals to admit their guilt with the unwillingness of petitioner, is strikingly similar to the language condemned by the Fifth Circuit in Benham v. United States, 215 F.2d 472, 474 n. 1 (5th Cir. 1954), where the prosecutor told the jury,

> "The defendant is seeking, as is not unusual, to lay off his guilt here on women folks - these three women that took the stand - or dead people. He doesn't have the courage to come up before you and say, 'Yes, I did it.'"

The Court of Appeal in the instant case relied upon two prior decisions from the circuit, United States v. Taitano, 442 F.2d 467, 468-69 (9th Cir.), cert. denied, 404 U.S. 852 (1971), and Hayes v. United States, 368 F.2d 814, 816 (9th Cir. 1966). Neither case is apposite. In Taitano no objection was made to the alleged improper remark of the prosecutor until after the guilty verdict; in Hayes the prosecutor's comments were really directed to statements made by the defendant to an FBI agent. Neither

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4/ This test was approved by the District of Columbia Circuit in United States v. Williams, 521 F.2d 950 (D.C. Cir. 1975).

case involved the kind of improper remark made herein, a remark clearly designed to refer to the petitioner's silence.

It is obvious that the prosecutor was telling the jury that petitioner did not testify - that he was unwilling to admit guilt. The prosecutor contrasted four government witnesses with petitioner and co-defendant Weisenthal, and pointed out the only difference between them: four were willing to testify and two were not. Obviously, the jury took the statement as it was intended - a comment on petitioner's failure to testify. The district court must have felt the same way, at least initially, because it gave a cautionary instruction and seriously considered granting a mistrial motion. The Court of Appeal said it was "of questionable propriety." The problem is that the courts below have failed to say whether the statement of the prosecutor was a comment on petitioner's failure to testify.

Petitioner submits that a court must make a decision one way or the other. Either it is a comment on silence or it is not. The conclusion that it is such a comment does not necessarily end the matter. Harmless error under Chapman would have to be determined. See, e.g., Anderson v. Nelson, 390 U.S. 523 (1968). But the court must first make the threshhold determination. Here, the court below failed to do so. By not ruling clearly on the issue, the Court of Appeal did not proceed further to determine whether the error was harmless beyond a reasonable doubt.

This Court should grant certiorari in order to explain the steps which must be followed in determining "Griffin issues." Hopefully, the Court will hold that the process involves two separate steps: (1) decide whether a comment on silence was made and, if so, (2) whether the comment was harmless beyond a reasonable doubt. Here, the Court of Appeal telescoped the process by ambiguously stating that the statement "was not so clear a comment . . . that it requires reversal." If the Court of Appeal felt it was not a comment on silence it should have so stated. If it felt it was such a comment, the Court of Appeal erred in not determining whether it was harmless beyond a reasonable doubt. This type of fuzzy reasoning should not be permitted.[5/]

5/ In deciding whether the error is harmless beyond a reasonable doubt, a court may consider the number of comments made. Of course, one may be sufficient. See United States v. Broadhead, 413 F. 2d 1351 (7th Cir. 1969).

B. CERTIORARI SHOULD BE GRANTED BECAUSE THE COURT OF APPEAL HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

The Court of Appeal has almost effectively shielded its decision from review by this Court by failing to articulate the basis of its rejection of petitioner's Griffin contention. The Court of Appeal refused to state whether it considered the prosecutor's statement to constitute a comment on petitioner's silence. Moreover, it failed to state whether, assuming Griffin error, the error was harmless beyond a reasonable doubt.

The Court of Appeal made judicial review even more unlikely by not publishing its decision in order to avoid creating a conflict among the circuits. Litigants, especially defendants facing substantial jail time, are entitled to well thought-out decisions.[6/]

6/ The unsigned Memorandum of the Court of Appeal indicates the participation of a district judge. Circuit Judge Shirley M. Hufstedler

(cont. p. 16)

Petitioner respectfully submits that the manner in which the Court of Appeal handled the appeal requires this Court to exercise its supervisory jurisdiction by granting certiorari and either reviewing the case for the reasons expressed in Part A above and Part C below, or vacating and remanding the case to the Court of Appeal for the purpose of writing a new decision or memorandum.

Petitioner recognizes there is no constitutional right to appellate review; nevertheless, having been granted such right statutorily, petitioner is entitled to a more articulate decision.

6/ (cont. from p. 15)
recently criticized "the extensive use of visiting district judges." California Attorneys for Criminal Justice, Forum, Vol. 5, No. 2, p. 8. It is noteworthy that the Court of Appeal only corrected one of the two obvious errors in its original Memorandum. The other error, while not material, was called to the court's attention in the petition for rehearing, but apparently was forgotten or ignored.

C. THIS CASE PRESENTS AN IMPORTANT QUESTION OF CONSTITUTIONAL LAW INVOLVING THE STANDARDS FOR DETERMINING THE PROPER LENGTH FOR CLOSING ARGUMENT.

This Court recently recognized the fundamental right of a defendant to argue at the conclusion of a criminal case. Herring v. New York, 422 U.S. 853 (1975). In Herring, the trial judge in a non jury trial refused to hear closing argument, and this Court reversed. The instant case is even a stronger case for review by this Court because the instant case was tried before a jury and was tried in a federal court.

In Herring this Court established the fundamental nature of closing argument but did not have the occasion to impose guidelines on trial judges. 7/ Instead, this Court stated the trial judge "must be and is given great latitude in controlling the duration and limiting the scope of closing summations" and that "he may limit counsel to a reasonable time . . . ."

7/ The Court here may rely on its federal supervisorial role to set standards for federal trials without "setting" them in constitutional "concrete."

The Court of Appeal misconstrued the nature of this Court's comments in Herring by applying them to the instant case where the time requested, one hour, was reasonable, where petitioner's counsel was courteous throughout the trial, where there was no reason to cut the request by one-third, where the trial was long and complex, and where the trial court all but told the jury it could not have testimony read by the reporter.

In Herring, this Court's comments about the authority of the trial court to limit closing argument were made in the context of its discussion of "repetitive" and "redundant" argument and in light of the Court's concern that argument not "impede the fair and orderly conduct of the trial." Petitioner believes those comments were made to give trial judges the authority to control those attorneys who have participated in courtroom disruptions and generally engaged in contumacious conduct. Cf. In re Dellinger, 461 F.2d 839 (7th Cir. 1972).

Here, however, petitioner's counsel was courteous throughout the trial. He simply needed the hour to argue. Because one-third of his time was cut, he attempted to tell the jury to have the court reporter read testimony he did not have time to discuss if the jury could not recall it but the trial court interceded to tell the jury it was not the custom to permit it.

The fact of the matter is the trial court restricted closing argument because it felt the petitioner was guilty as evidenced by its facetious

comments prior to argument.[8/] Herring teaches us that the trial judge's belief in the defendant's guilt cannot justify interference with closing argument.

This Court should grant certiorari to define more clearly what it said in Herring about the authority of trial judges to limit the time for closing argument. Obviously there must be some standard to guide the trial court; perhaps the trial court should, for the purpose of facilitating intelligent judicial review, state its reasons for denying counsel's request. Here, the record is silent, except for the trial court's obvious desire to get the trial over quickly and its belief in petitioner's guilt.

There is really very little difference between denying closing argument and substantially limiting the time for closing argument. It is really only a matter of degree. Here, argument was more important than in Herring because of the jury and the complexity of the case.

8/ Prior to closing argument, the trial court asked, "How long are you gentlemen going to discuss the credibility of the Government witnesses?" (TR. 744.) By that, the court admitted that it wanted to know how long defense counsel wanted to argue (Tr. 744, lines 13-15). The court also said, "I'd think maybe you'd want the jury to forget about everything that had been said." (Tr. 744, lines 22-23).

Because of the Fifth and Sixth Amendment rights involved in closing argument[9/] this Court should grant certiorari to consider the important issues presented.

CONCLUSION

For the reasons expressed herein, this Petition for Writ of Certiorari should be granted and the judgment of the Court of Appeal should be reversed.

Respectfully submitted,

ROGER JON DIAMOND

Attorney for Petitioner

9/ Jury trial, due process, and effective assistance of counsel.

APPENDIX No. 1

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA	)	FILED Jan 18 1978
Appellee,	)	Emil E. Melfi, Jr. clerk, U.S. Court of Appeals
v.	)	No. 77-1693
RUSSELL McNIFF,	)	MEMORANDUM
Appellant.	)	

Appeal from the United States District Court for the Central District of California

Before: CHAMBERS and GOODWIN, Circuit Judges, and SOLOMON,* District Judge.

McNiff was convicted of conspiracy and mail fraud for his part in invoicing businesses for office supplies never order or sent. He appeals. We affirm.

McNiff had been indicted for an earlier conspiracy to bill businesses for advertisements never placed or run. The jury in the first conspiracy trial acquitted McNiff but convicted

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*The Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

his alleged coconspirator, Harvey Weisenthal. The present indictment was returned after the first trial. The defendants in both cases were generally the same. By the time the second case went to trial all defendants except Weisenthal and McNiff had pleaded guilty. The jury convicted McNiff and Weisenthal. Weisenthal is a fugitive, and has presented no issues for appeal.

McNiff now argues that because both conspiracies were based on similar facts and involved most of the same people, the government's failure to join the two indictments violated his due process rights. The government asserts that the two conspiracies could not have been joined for trial, but we need not rule on this assertion. It is sufficient to note that there are no grounds for requiring joinder here. Fed. R. Crim. P. 8(a) states that two or more offenses "may be joined in the same indictment" if they are similar. The rule is permissive rather than mandatory.

Here we have no evidence that the failure to join the charges was the result of prosecutorial misconduct. A conscious prosecutorial decision to charge and try seriatim a number of crimes which could have been joined under Rule 8(a) merely to harass a defendant, or to improve the possibility of at least one conviction out of doubtful cases, or to withhold charges on one case to await the outcome of a trial on another, might raise some due-process questions. Sanchez v. United States, 341 F.2d 225, 228 (9th Cir.), cert. denied, 382 U.S. 856 (1965). But here McNiff knew before the first trial started that the second indictment was on the way. The delay was motivated by the

government's need for further evidence rather than by a conscious stratagem. There is nothing in Rule 8(a) or in common sense that requires a prosecutor to rush a case to the grand jury while evidence is still to be collected.

McNiff recognizes that he has no Sixth Amendment speedy trial claim because he was not arrested on the current charge until he had been indicted. United States v. Marion, 404 U.S. 307 (1971).

His Fifth Amendment due process claim based on pre-indictment delay fails because he has shown no prejudice other than the burdens inherent in an additional trial. McNiff may not complain of the government's use of the time to gain additional evidence, so long as his own evidence remained unimpaired; the government need not bring charges the moment it has probable cause. United States v. Mays, 549 F.2d 670, 677-78 (9th Cir. 1977).

McNiff asserts other alleged errors in the reference to Weisenthal's earlier conviction during the second trial. He claims that this evidence prejudiced him by linking him with Weisenthal's previous fraudulent activity. He was free to tell the jury about his own acquittal, had he choosen to do so.

McNiff had sought a severance from Weisenthal but failed to pursue it diligently. United States v. Kaplan, 554 F.2d 958, 966, (9th Cir. 1972). In any event, there was no abuse of discretion in trying the two conspirators together.

Moreover, the trial court carefully instructed the jury that it could consider the previous conviction of Weisenthal only on the issues of Weisenthal's state of mind and intent, and that it could not use Weisenthal's conviction against McNiff at all. This was everything to which McNiff was entitled.

Witness Berk testified that, at the beginning of the conspiracy, McNiff complained that he would be "getting less" than he had received before. This statement was relevant to McNiff's intent in entering the conspiracy, and it did not violate the court's forceful instruction to Berk not to mention McNiff's activities before the second conspiracy began. The testimony may have given the jury some cause to speculate about McNiff's previous involvement in fraudulent schemes, but a man's history is of his own making. The court's refusal to grant a mistrial because of this single statement was not erroneous.

McNiff's remaining contentions are also without merit. An article concerning an unrelated conspiracy involving persons unrelated to the present case appeared on page three of section two of a newspaper on the first day of the trial. This coincidence is not the sort of prejudicial "pretrial publicity" which the Supreme Court condemned in Sheppard v. Maxwell, 384 U.S. 333 (1966).

McNiff's attempt to question a witness Sulak about Sulak's son's involvement in the conspiracy and about Sulak's involvement in other conspiracies not involving McNiff was ruled irrelevant. This was no error. The court has considerable

discretion in controlling the scope of cross-examination and in excluding evidence that might simply lengthen the trial or confuse the issues. Fed. R. Evid. 403; United States v. Stanfield, 521 F.2d 1122, 1128 (9th Cir. 1975).

The court allowed McNiff's attorney forty minutes for closing argument instead of the hour requested. This was not a denial of the right to make a closing argument under Herring v. New York, 422 U.S. 854 (1975). The court in Herring recognized that the trial court may limit argument to a reasonable time. Counsel should be flexible enought to adjust an argument to any reasonable time the court may allow.

The prosecutor's statement to the jury, that the only difference between the defendants and the witnesses who testified for the government was that the government's witnesses were willing to admit that they were crooks, while of questionable propriety, was not so clear a comment on McNiff's failure to testify that it requires reversal. See United States v. Taitano, 442 F.2d 467, 678-69 (9th Cir.), cert. denied, 404 U.S. 852 (1971); Hayes v. United States, 368 F.2d 814, 816 (9th Cir. 1966).

The trial court instructed the jury that, in order to make a defense of withdrawal, McNiff had to perform an affirmative act to disavow or defeat the purpose of the conspiracy. McNiff objects to the instruction, but he cites no cases. The lack of cases is understandable because the instruction was correct. United States v. Cullen, 499 F.2d 545, 547 (9th Cir. 1974).

Finally, if McNiff still has a claim for personal property which he says should have been returned to him, that is a civil matter which has nothing to do with the validity of his conviction, and which presents no issues for this appeal.

Affirmed.

APPENDIX No. 2

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
Feb 24 1978
Emil E. Melfi, Jr.
clerk, U.S. Court
of Appeals

UNITED STATES OF AMERICA,
Appellee,
v.
RUSSELL McNIFF,
Appellant.

No. 77-1693

ORDER

Appeal from the United States District Court for the Central District of California

Before: CHAMBERS and GOODWIN, Circuit Judges, and SOLOMON*, District Judge.

The Memorandum filed January 18, 1978, in the above-numbered case is amended as follows:

On page 4 of the printed slip memorandum, beginning at line 7 (page 4, line 26 of typed Memorandum), after "between the" insert "defendants and the"; after "government" delete "and those who testified for the defendants"; and after "was" insert "that".

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*The Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

The attached amended pages 4 and 5 for the typewritten Memorandum, incorporating the above changes, are filed herewith.

With the Memorandum so amended, appellant's petition for rehearing filed January 30, 1978, is denied.

Appellant's motion for an order staying the issuance of the mandate in this case pending the filing, consideration, and disposition by the Supreme Court of the United States of a petition for writ of certiorari is denied.